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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-878

ACCU-NAMICS, INC.,

Petitioner,

v.

SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
List of Authorities	ii
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	4
Reasons For Granting the Writ	7
Conclusion	11
Proof of Service	12

Appendix

Exhibit A	A-1
Exhibit B	A-34
Exhibit C	A-49
Exhibit D	A-58
Exhibit E	A-59

Cases: **Page**

Brennan v. OSHRC (Bill Echols Trucking Co.), 487 F.2d 230 (5th Cir. 1973) 7

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) 9

Constitution and Statues:

Title 29 U.S.C.

Sec. 657(a) 4

Sec. 657(e) 4

Sec. 659(c) 3

Sec. 660(a) 2, 3

Sec. 661(i) 3

Administrative Regulations:

29 C.F.R. §1926.652(b) 4, 5, 9

29 C.F.R. §1926.652(e) 4, 5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Accu-Namics, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

This is an appeal under the Occupational Safety and Health Act of 1970 (29 USC §651, et seq.). The opinion of the Occupational Safety and Health Review Commission's Hearing Judge is set forth in Exhibit A, infra, pages A-1 - A-33.

The opinion of the Occupational Safety and Health Review Commission is set forth in Exhibit B, infra, pages A-34 - A-48. The opinion of the Court of Appeals (Exhibit C, infra, pages A-49 - A-58) is reported at 515 F.2d 828, and its opinion on Petition For Rehearing En Banc is set forth in Exhibit D, infra, page A-59.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1975, and its Order denying the Petition for Rehearing En Banc was entered on September 26, 1975. The jurisdiction of this Court is invoked under 26 U.S.C., Section 660(a) and 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1) Whether the Secretary of Labor has shown by a substantial evidence that Petitioner (Employer herein) was in violation of the safety standards and whether the substantial evidence rule supports said finding by the Court of Appeals and the Occupational Safety and Health Review Commission (hereinafter OSHRC).

2) Whether the Secretary of Labor's violations of the requirements of the Occupational Safety and Health Act of 1970, 29 U.S.C., Section 651 (hereinafter called The Act), the alleged safety violations and all procedures following said violations.

3) Whether the OSHRC may render initial findings and conclusions in conflict with its Hearing Judge and make initial findings and conclusions without having heard the testimony

of the witnesses and having the decision of the Hearing Judge on whether or not safety standards have been violated.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C.

Section 659(c) in pertinent part states:

> "(c) If an employer notifies the Secretary that he intends to contest a citation issued under Section 658(a) of this Title . . . the Secretary shall immediately advise the Commission (OSHRC) of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance . . ."

Section 661(i) in pertinent part states:

> "(i) A hearing examiner appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission, and . . . shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the hearing examiner shall become the final order of the Commission within thirty days after such report by the hearing examiner, unless within such period any Commission member has directed that such report shall be reviewed by the Commission."

Section 660(a) in pertinent part states:

> "The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive . . ."

Section 657(a) and (e) in pertinent parts state:

> "(a) In order to carry out the purposes of this Chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized —
>
> (1) to enter without delay . . . and
>
> (2) to inspect and investigate . . .
>
> (e) Subject to regulations issued by the Secretary, a representative of the employer . . . shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any work place . . ."

29 C.F.R. § 1926.652(b) and (e) read in pertinent parts:

> "(b) Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped or otherwise supported by means of sufficient strength to protect the employees working within them."
>
> "(e) Additional precautions by way of shoring and bracing shall be taken to prevent slides or cave-ins when excavations or trenches are made in locations adjacent to backfilled excavations, or where excavations are subjected to vibrations from railroad or highway traffic, the operation of machinery, or any other source."

STATEMENT

On January 18, 1972, Accu-Namics, Inc. (the Employer) was installing a sewer line for the City of Lubbock, Texas. A cave-in occurred in the trench and four employees were killed. While futile rescue operations were in progress, a representative of the Secretary of Labor (a Compliance Officer) joined the multitudes at the scene and without presenting his credentials (or even identifying himslf) to the employer and without affording the employer an opportunity to accompany

him, conducted an alleged inspection under the Act. The Compliance Officer returned the next day and conducted further inspection without seeking out the employer.

Thereafter the Secretary issued its citation for violations of safety standards 29 CFR 1926.652(b) and (e) (both cited supra) and proposed a $500.00 penalty. The Employer filed its contest of the violations and of the proposed penalty. The case was heard by the OSHRC Hearing Examiner (Judge). The Secretary introduced no evidenec as to whether or not the sides of the trench were in "unstable or soft materials" but relied upon the after fact that a cave-in had occurred to show its case. The Employer proved, by all of the credible evidence, that the trench was being dug in stable soil which was not of soft material and that no additional precautions were called for. The Employer's proof then demonstrated to the Judge the reasons why the cave-in had occurred. These reasons for the cave-in were later adopted by the Review Commission and by the Court of Appeals as the substantial evidence that the trench was being dug in "unstable or soft materials," and that the safety standards were being violated immediately prior to the accident. Such is not the test. The fact that an accident occurs is no evidence that a safety standard has been violated.

The Hearing Judge, in his decision, made no determination as to whether or not the safety standard had been violated (Exhibit A, infra pps. A-1 - A-33.). He dismissed the Secretary's case due to the violations of the Act by the Secretary's representative in coming onto the jobsite and conducting his entire inspection without presenting his credentials to the

Employer or affording the Employer an opportunity to accomany him on his inspection. The Judge's decision was that the Secretary had violated the Act, his own procedural regulations and substantive due process, and the citation and proposed penalty were vacated.

The Review Commission ordered a review of the case, apparenlty on motion by the Secretary, although the record is void of any motion or request of any party for a review by the Commission.

The Review Commission, by a 2:1 vote, reversed the Judge's dismissal of the case on procedural grounds, and on its own volition and without considering the Judge's opinion on whether or not the trench was dug in "unstable or soft conditions" entered its own findings that the Employer had violated the safety standards and affirmed a penalty. The Commission said: (Exhibit B, infra, p. A-45) ". . . we specifically adopt the Judge's findings of fact." but it ignored the Judge's findings on the soil conditions which were:

> "The soil being excavated on 82nd Street (the job-site) at the time of the cave-in was stable (Tr. 85-316, 319, 320, 399.) (Appendix A, infra, pps. A-00 to A-00) It is also described as cemented sand and gravel (Tr. 399-400)." (Appendix A, infra, p. A-16)

In the Court of Appeals, the Employer requested that if the Court did not reverse the Review Commission's decision as not being supported by the substantial evidence or dismiss the citation for violations of the Act by the Secretary, then the case should be remanded to the OSHRC for a determination by the Judge as to whether or not any safety standard

had been violated by the Employer. The Court of Appeals denied the Employer's request. (Exhibit C, infra, pps. A-49 - A-58), 515 F.2d 828.

The Court of Appeals affirmed the Review Commission's decision that there were violations of safety standards. The Court also held that even if the Secretary had violated the Act in his inspection procedures, that the Employer failed to show any prejudice and that the burden is upon an Employer to show a prejudice to him by any illegal acts of the Secretary of Labor. The Court cited it opinion in *Brennan v. OSHRC* (Bill Echols Trucking Co.) 5th Cir. 1973, 487 F.2d 230, 236. The Court also held that the Review Commission was the ultimate finder of facts (not the Judge) and that the Review Commission need not remand the case to the Hearing Judge for a decision on whether or not the safety standards had been violated.

REASONS FOR GRANTING THE WRIT

The Employer submits that the holding of the Court below is erroneous because:

(1) The overwhelming weight of credible evidence is that there were no violations of safety standards and that the trench was not being dug in unstable or soft materials;

(2) The Secretary violated the express provisions of the Act, and no valid finding of violations of safety standards can arise therefrom.

(3) The Review Commission violated the Act, and procedural due process, by enterig initial findings and conclusions

on the safety standards, which decision ignored the findings of its Hearing Judge.

This case should be reversed and rendered not only for a myriad of substantive and procedural blunders by the Secretary of Labor, but also because the Judge, the Review Commission and the Court of Appeals all became so enamored with the procedural questions that the overwhelming proof of the Employer's innocence of any violations of safety standards was never considered.

The Employer, from the beginning, denied any safety wrongdoing and at the hearing put on a wealth of proof that it had not violated any safety standards. The Judge, in his decision, did everything but conclude that no safety standard had been violated. The Review Commission, while saying that it reviewed the transcript of testimony and exhibits, spent most of its opinion overruling the Hearing Judge's decision on procedures. The Court of Appeals accepted the Review Commission's summary of the testimony and exhibits and wrote more law on procedures of the Review Commission and its Hearing Judge. In the very face of a day by day practice by the Review Commission of affirming judges' decisions when the Review Commission is divided by a 1:1 vote, the Court of Appeals insists that the Act states that the Review Commission, not the Hearing Judge, is the determiner of facts and law. Nothing is farther from what the Review Commission does. Nothing could be farther from the express provisions of the Act. The Review Commission said in its opinion that it specifically adopted the Hearing Judge's Findings of Fact (Exhibit B, page A-45). The Commission then ignored the

Judge's findings re the safety standards and the soil conditions and considered only the undisputed causes of the accident.

The Court of Appeals did the same thing — equating the causes of the cave-in with whether or not a safety standard had been violated. (Exhibit C, pps. A-49 - A-58.)

There was no substantial testimony in the record that the trench was being dug in unstable or soft conditions (29 CFR 1926.625(b), cited supra). All of the testimony was that the soil was stable and not of soft materials. The causes of the accident, given by the Employer's expert witness, adopted by the Review Commission and by the Court of Appeals are not the test of whether or not the safety standards had been violated. The same expert witness who listed the causes of the accident explained that the trench was not being dug in unstable soil or soft conditions and that there was no violation of the safety standard (SF 399-400). The Review Commission and the Court of Appeals ignore the direct testimony on soil conditions and go to the causes of the cave-in and say because there was a cave-in there were violations of safety standards.

Clearly the Review Commission here did enter a decision in disagreement with its own Hearing Examiner. The Commission said that: ". . . We specifically adopt the Judge's findings of fact" (Exhibit B, p. A-45), and then proceeded to adopt none of the Judge's findings. The Court of Appeals followed the same reasoning. Understandably, the Commission and the Court of Appeals wanted to avoid a conflict with this Court's opinion in *Universal Camera Corp. v. N.L.R.B*, 340 U.S. 474

(1951), where Justice Frankfurter directed that a reviewing court must consider an examiner's report as part of the record, especially since the examiner, and not the review board, had the opportunity to observe the witnesses. The Review Commission and the Court of Appeals patently ignored the evidence; the Hearing Judge's findings on the soil conditions (Exhibit A, p. A-16) and substituted therefor the findings of the cause of the cave-in. (Exhibit A, p. A-14.)

The decision of the Court of Appeals, if allowed to stand, is that:

(a) the substantial evidence rule is that a safety standard has been violated if an accident occurs;

(b) while the Statute states that the Secretary's representatime *shall* allow the employer an opportunity to accompany him on his inspection, the Statute really means "may" or "should" do so;

(c) while the Statute states that the Secretary's representative is authorized to inspect a workplace upon *presenting appropriate credentials* to the owner . . . it really means the representative may or should do so;

(d) while the Statute states that the hearing examiner *shall* make a report and determination on a safety violation, it really means that he may;

(e) the burden of proof is upon the employer to show that it was prejudiced by the illegal acts of the Secretary of Labor before such illegal acts shall void alleged safety violations.

The Occupational Safety and Health Act of 1970 is new.

There is a need for this Court to set the record clear — that the Statute, in its plain wording is definite —

(a) The Secretary has the burden of proof and that burden is by the substantial weight of credible evidence; evidence of an accident is not proof of a violation of any safety standard.

(b) The Courts must consider the substantial evidence in the record and not accept what an administrative agency says the substantial evidence is;

(c) The Secretary must follow the express provisions of the Act. Congress intended that when it said *shall* it meant shall and not should;

(d) The burden is not upon an employer to show that it has been prejudiced by the illegal acts of the Secretary of Labor.

CONCLUSION

For the foregoing reasons, the Petition For a Writ of Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this ..... day of December, 1975, three copies of the Petition For Writ of Certiorari were mailed, postage prepaid, to:

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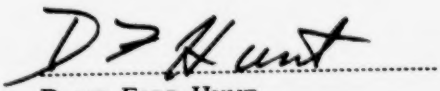
Washington, D.C. 20430

I further certify that all parties required to be served have been served.



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APPENDIX

EXHIBIT A

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 Peachtree Street, N.E.
Atlanta, Georgia 30309

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor, Complainant,
v.
ACCU-NAMICS, INC., Respondent.

DECISION AND ORDER
OSHARC Docket No. 477

APPEARANCES:

James E. White, Attorney at Law, Dallas, Texas,
for the Secretary of Labor

David Ford Hunt, Dallas, Texas, and Hugh Anderson,
Lubbock, Texas, Attorneys at Law, for Respondent

STATEMENT OF CASE

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, 84 Stat. 1590 (hereinafter referred to as the Act), to review a Citation For Serious Violation issued by the Secretary of Labor (hereinafter referred to as the complainant) pursuant to Section 9(a) of the Act, and a proposed assessment of penalty in the amount of $500 upon such violation pursuant to Section 10(a) of the Act.

The Citation For Serious Violation was issued on January 27, 1972 and alleged a violation of 29 CFR 1926.652(b) and (e) and 29 CFR 1926.653(p). The three violations were alleged in the aggregate to constitute one serious violation. The Notification of Proposed Penalty was issued on the same date and proposed a penalty of $500 for the serious violation. On January 29, 1972, which was within fifteen days of receipt of the complainant's Notification of Proposed Penalty and Citation for Serious Violation, the respondent notified the complainant that it wished to contest the alleged serious violation and proposed penalty. The Citation for Serious Violation described the alleged violations of 29 CFR 1926.652(b) and (e) and 29 CFR 1926.653(p) as follows:

> Employees working in trench equipped with portable trench shield to install a sewer line 21" in diameter of Flex Tran RPM pipe of 10 and 20 foot sections. Trench was 24.3 feet deep at STA 94 + 20 with vertical side walls. The portable trench shield being used was 22 feet long and extended 14.25 feet into the trench from ground level, thus exposing employees working in bottom of the trench to 10 feet of unshielded trench sidewalls.
>
> The bottom 21 feet of trench was caliche (calcium carbonate) a soft material. The bottom of the trench was not adequately shored, sheeted, braced, sloped or otherwise supported by means of sufficient strength to protect employees working at the bottom of the trench as required in 1926.652(b).
>
> Additional precautions by means of shoring or bracing were not taken to prevent slides or cave-ins along the trench as a result of a backfilled excavation, a gas line, existing 5 feet deep, 5.5 feet North of the center line of excavated trench as required in 1926.652(e).
>
> The above mentioned portable trench shield does not meet the definition requirement as stated in 1926.653(p) where-

in shoring will support the walls of a trench "to the trench bottom", and therefore does not offer protection required in 1926.652(b) and (e).

The complainant advised the Occupational Safety and Health Review Commission of the Notice of Contest by respondent. The Commission assigned the case to this judge for purposes of conducting a hearing pursuant to Section 10(c) of the Act. The hearing was held in Lubbock, Texas on May 30 and May 31, 1972. No additional parties desired to intervene in the proceedings.

On May 30, 1972, respondent filed a Motion to Dismiss based on several allegations that the Act is unconstitutional. In addition a demand was made for a jury trial. These motions were denied at the commencement of the hearing on May 30, 1972. (Tr. 2-5)

ISSUES

The first issue for determination is whether respondent was engaged in a business affecting commerce within the meaning of the Act. If the Act is applicable to respondent, it further contends that the inspection was illegal and void. This issue arises as the result of the compliance officer's failure to properly identify himself and the purpose of his visit to the workplace on January 18 and 19, 1972. The first meeting with respondent's management was on January 20, 1972.

If the above two issues are resolved favorably for complainant, then a determination must be made as to whether there was a violation of 29 CFR 1926.652(b) and (e). If a violation of one or both of the standards occurred, a further question

arises as to whether the violation was of a serious nature under the criteria provided by Section 17(k) of the Act. If a violation did occur, a determination must also be made as to the appropriate penalty to be imposed under the Act.

While the Citation for Serious Violation refers to 29 CFR 1926.652(p), complainant does not contend respondent violated this section since it only contains a definition of "trench shield." The section was cited to show that the shield used by respondent was improper for purposes of satisfying the requirements of 29 CFR 1926. 652(b) and (e). (Tr. 270; Complainant's Proposed Conclusions of Law IV)

FINDINGS OF FACT

The evidence of record has been carefully considered and evaluated in its entirety. The facts hereinafter set forth are specifically determined in resolving the issues presented in this case.

Respondent is a corporation with its principal office and place of business at Lubbock, Texas. It was at all times material hereto engaged in the business of installing underground water and sewer pipes or lines and in rendering consultation services to management of other construction companies. (Complaint and Answer; Tr. 17) Its principal stockholder is Robert Dragoo, who acts as general manager and president of the company. (Tr. 17) He has worked in the utility construction industry for 15 years. (Tr. 20, 273) Prior to his association with Accu-Namics, Dragoo was employed as general manager for R. H. Fulton, Inc., who was engaged in the installation of water lines and cross-country gas lines. (Tr. 21, 274)

Respondent had been incorporated for approximately 2½ years at the time of the hearing. (Tr. 17) It is the smallest utility contractor in the Lubbock area. (Tr. 26) During the year 1971 it had an average daily employment of approximately 12 people. (Tr. 25) During its corporate existence, it has engaged in two construction projects. One of the construction jobs was a river control project in Nebraska. The project was administered from respondent's Lubbock office. (Tr. 18) In connection with the Nebraska project, plans and specifications, as well as correspondence, were transmitted between Lubbock, Texas, and Nebraska. Respondent's president made two trips to the Nebraska project. Materials for the project were obtained from plants in Chicago and Pueblo, Colorado. (Tr. 18-19)

Respondent's president has also done consulting work for various contractors throughout the United States. The principal consulting work was done for R. H. Fulton, Inc. of Lubbock, Texas, and Pipeline Management and Construction, Joliet, Illinois. Respondent has received correspondence from them relating to its president's consulting work. (Tr. 19-20)

The second construction project undertaken by respondent involved the installation of approximately 14,700 feet of sewer line for the City of Lubbock, Texas. The work consisted of installing four blocks of a 15" system on 58th Street and approximately 11,000 feet of 21" and 24" pipe along 82nd Street. The work was performed under City of Lubbock General Work Order No. 10473. (Exs. H, I; Tr. 23-24, 52, 64, 307) The contract for the project was entered into between the City of Lubbock and the respondent in August, 1971. (Ex. I)

The Lubbock sewer project was the only construction work performed by respondent during 1971. (Tr. 25) It was completed in April, 1972. (Tr. 99)

On August 24, 1971, Robert Dragoo and two of respondent's employees, Darrell and Bill Conklin, visited the OSHA office in Lubbock for the purpose of discussing the sewer project. (Ex. K; 243-244, 254) They wanted to ascertain the OSHA requirements which pertained to the project and to determine if respondent met the safety requirements for the job. (Ex. K; Tr. 263) A discussion was held with Compliance Officer Jerry Bailey but he was not experienced in the operations of the pipeline industry and was unfamiliar with the detailed requirements for trenching operations. (Tr. 263) Copies of the standards and the Act were furnished to Dragoo. (Tr. 264, 289-290) Dragoo was informed that if he would like to return within the next three weeks the construction specialist, a compliance officer whose specialty was construction, would discuss the matter with him. (Ex. K; Tr. 259-260, 263) The construction specialist at the time was in school. (Tr. 259) When he reported for duty the memorandum of the discussion between Dragoo and Compliance Officer Bailey was not brought to his attention. (Tr. 266) Dragoo and the other two employees of respondent did not return to the OSHA office after the initial visit on August 24, 1972. (Tr. 265)

Respondent's president, Robert Dragoo, designed a portable steel frame and steel sheeted box, hereinafter referred to as a trench shield, for use in connection with the Lubbock sewer project. (Tr. 29, 45) The trench shield was manufactured by respondent. (Tr. 29-30) It had steel plates on the sides. (Tr. 56)

The shield was designed to extend downward into a ditch to a depth of 14 feet. (Tr. 30, 56) It was 22 feet long and of variable width. The design was made so that the width could be varied from 28" to 44", depending upon the width of the ditch. (Tr. 45, 49-50)

The shield had a hopper in front and one in back that was designed to hold 3 cubic yards or 7800 pounds of gravel or subgrade embedment. (Ex. S; Tr. 128) The shield weighed 5064 pounds and the trailer weighed a total of 3,225 pounds. (Ex. S; Tr. 302) The shield was supported within a mobile frame that rode above the ditch on the right-of-way behind the ditching machine on four wheels and was normally pulled by the ladder trencher. (Ex. D; Tr. 28, 45, 48, 50) The four wheels which supported the shield were approximately 28 or 29 feet from front to back. The front and back wheels were also constructed so that the distance in width between them was 11 feet or 5½ feet on either side of the center line of the ditch. (Tr. 50) Each wheel of the shield frame was designed to carry 5,855 pounds. (Ex. S; Tr. 312) No similar protective shields were being used in Lubbock County, Texas. (Tr. 55, 73)

The protective shield was designed for several purposes which included: (1) protection of workmen from a cave-in, (2) protection of materials that might fall into the ditch as employees worked around the area, (3) guarding against sloughing of materials on top, particularly where there were cable, water or gas lines in the proximity, and (4) guarding against the waste of embedment material. (Tr. 29, 31-32, 42, 287-288) There were also additional side benefits in that it carried a walkway with handrails over the ditch to permit workmen to go from

one side to the other as necessary during their work. It also helped to keep backfill material at a distance greater than four feet from the ditch since it had to be towed. (Tr. 43, 287)

Normal oprations for the Lubbock sewer project consisted of staking the line, preparing the right of way to be excavated to provide a suitable surface on which to operate the trenching machine, trenching of the ditch to the necessary depth, installation of the pipe, setting of a manhole if required in a particular location, handling of embedment material, stringing pipe, backfilling, water jetting of the backfill material and clean up. Tr. 27-28)

The Lubbock sewer project consisted of the installation of two separate sections of sewer line. One portion was located on 58th Street. The second part of the project was along Memphis Avenue and 82nd Street. Memphis Avenue runs perpendicular to 82nd Avenue. The sewer line followed Memphis Avenue and then turned at a right angle and went along 82nd Street. (Ex. H; Tr. 35) The line proceeded on down 82nd Street crossing Quaker Avenue and then on to Slide Road. (Ex. H)

The trench on the sewer project varied in depth from 8' to 28'. The variance in depth was necessary since the line and the topographical variation in the surface had to be dealt with in regard to the flow line of the pipe itself. The trench varied in width from 28" for the 15" pipe to 39" for the 21" pipe. (Tr. 24, 152)

The paving on 82nd Street from Memphis Avenue to Slide Road was 20 feet wide. (Ex. H; Tr. 69, 93) The city plat for the sewer project reflected that a 20" high pressure natural gas

line was located 28 feet north of the center line of 82nd Street. (Ex. H; Tr. 35, 70-71, 93) The sewer line was to be constructed 10' south of the edge of the pavement on 82nd Street. (Ex. H; Tr. 71) The city plat indicated that the distance between the center of the gas line and the center of the sewer line was to be 8 feet. (Ex. H; Tr. 96, 509) The trench excavation for the sewer ran parallel to the gas line along 82nd Street to Slide Road. (Ex. H; Tr. 35, 93, 96) The gas line was crossed at Memphis Avenue when respondent made the turn to parallel 82nd Street. (Tr. 109)

The natural gas line was installed along 82nd Street in April 1967. (Tr. 90, 93) The gas line was approximately 5 feet deep from ground level to the bottom of the trench. There was 40" of cover on top of the 20" gas line. (Tr. 90, 94) The gas line trench had a width of approximately 30" at the bottom. (Tr. 94) Respondent was aware of the natural gas line as it was reflected on the city plat and the vents to the pipe had been observed. (Tr. 36-37, 112, 297-298) Respondent did not use any additional shoring or bracing when excavating parallel to the gas line. It relied on the trench shield to provide the necessary protection. (Tr. 39-40) In addition all employees were continually given instructions to watch for cracks throughout the job. (Tr. 308-309) The crew foreman and other employees looked for visible signs which would indicate that the top of the ground might give away. (Tr. 112, 157)

On January 18, 1972, the sewer line was being installed between Quaker Avenue and Slide Road on 82nd Street. (Tr. 27, 101, 146-147) Approximately 12,000 feet of the project had been completed as of January 18, 1972. (Tr. 52, 307)

Operations were normal on that date. A ladder trencher was cutting the ditch with the shield attached directly behind it. (Tr. 161, 148). The front of the shield and bucket line were approximately 25' apart at the top of the ditch. (Tr. 103) The ladder trencher extended into the ditch at an angle. (Tr. 103) The ladder trencher and shield were approximately 8 to 10 feet apart at the bottom of the shield. (Tr. 104)

No shoring or bracing was being used on January 18, 1972. The shield was the only protective device for the men working in the trench. (Tr. 104) The trench was approximately 24 feet deep and the shield lacked approximately 10 feet of extending to the bottom of the ditch. (Tr. 30, 106) A fixed rung ladder made out of 1" pipe, which attached to the side of the trench. extended the full depth of the shield. A rope ladder was used to extend to the bottom of the ditch. (Tr. 131-132)

The embedment rock was being placed and the pipe laid to grade. A bulldozer was keeping backfill pushed away from the ditch. Eddie Maxwell, Xeviar Sanchez, Raymond Rodriguez and Holly Murrell were working in the ditch. Two of them were removing loose dirt from the bottom of the ditch and shoveling it into the ladder trencher. The other two were subgrading, putting gravel in the ditch and laying the pipe to grade. (Tr. 101-102, 125, 155) The pipe was being lowered into the trench through the shield. (Tr. 29)

The ladder trencher being used on January 18, 1970, was a 160 Buckeye which cut to a maximum depth of 26 feet. (Tr. 149) The width of the cut was 39". (Tr. 152) On January 18, 1972, it was cutting a ditch of approximately 23 feet deep. Some of the top surface had been previously removed by a bull-

dozer. (Tr. 150) The width of the trencher machine was 8 feet. (Tr. 152) It was proceeding adjacent to the gas line as it cut the trench. (Tr. 154)

On the afternoon of January 18, 1972, a cave-in occurred. (Tr. 104-105, 155) Dirt came underneath the shield. (Tr. 107) At the point of the cave-in the trench was approximately 24 feet deep. (Tr. 30) The four men working in the ditch were killed. (Tr. 106) Two of the men were working inside the shield and two were working outside the shield within four or five feet of the ladder trencher. (Tr. 111, 124) No shoring or bracing was being used to protect the two men who were working outside the shield. (Tr. 111-112) They were found next to the ladder trencher. (Tr. 131) The crew foreman had observed the walls of the trench immediately prior to the accident and had observed nothing unusual about them. (Tr. 125) Normal operating procedures were being followed at the time of the cave-in. (Tr. 147)

Instructions had been given to all employees to work inside the protection of the trench shield. (Tr. 137, 299) However, the employees preferred to work outside the shield. The crew foreman was aware of their working outside the shield. He had observed them working outside the trench on other occasions. In lieu of ordering the employees to work within the protection of the shield, they were instructed to stay as close as they could to the inside of the shield. (Tr. 139-140)

There was an undisturbed column of soil approximately 4' from the north edge of the sewer line to the 20" gas line. (Tr. 109, 136, 153) Two of the wheels of the portable shield rolled

in the center of the backfill from the gas line trench. (Exs. 9, 10, W; Tr. 127-128, 153) On the afternoon of January 18, 1972, the hoppers on the shield were more than half full. (Tr. 129) The undisturbed column of soil sheared off approximately 5½ feet from the center of the sewer trench where the wheels of the portable shield were located. (Exs. W, 7, 9, 10) The gas line was exposed after the cave-in. (Exs. 6, 9, 10; Tr. 136)

On the day of the cave-in the soil removed from the trench was placed in a berm on the north side of the sewer line by a bulldozer approximately 5½ feet from the center line of the trench. (Ex. W; 112-113, 120) The height of the berm was approximately 3 to 3½ feet above the ground level. (Ex. W) The berm was to the north side of the gas line. The soil was returned to the trench as backfill by a bulldozer. (Tr. 113) The bulldozer usually operated beside the ladder trencher. (Tr. 118-119) On occasions the bulldozer operated on top of the gas line. (Tr. 113-114)

At the time of the accident the bulldozer and ladder trencher were not being operated. (Tr. 121-122, 157) The bulldozer was not operating because it needed lubrication. (Tr. 121, 158) It had a bad hydraulic leak and would only run 20 to 30 minutes prior to its having to be oiled. (Tr. 124) All equipment had been shut down two or three minutes prior to the cave-in. (Tr. 123) The engine of the ladder trencher was left running. (Tr. 158) There was usually some light traffic on 82nd Street. (Tr. 158)

The walls of the trench at the cave-in contained four layers of soil of different characteristics. The first five feet from the

surface downward was a brown organic clayey silt. The top soil was classified as ML (inorganic silts and very fine sands, rock flour, silty or clayey fine sands or clayey silts with slight plasticity) according to the Unified Soil Classification Table. From five feet to twelve feet downward the soil was a white and tan caliche. This soil was classified as CL (inorganic clays of low to medium plasticity, gravelly clays, sandy clays, silty clays, lean clays) according to the Unified Soil Classification Table. From twelve feet to approximately nineteen feet downward the soil was a slightly reddish sand which was friable even under fingers. It was classified as SM (silty sands, sand-silt mixture) according to the Unified Soil Classification Table. From nineteen feet downward the soil was a hard caliche and sand mixture. (Ex. W; Tr. 354-355, 377, 410)

The collapse of the trench occurred at the junction along the south side of the gas line and the natural soil for a length of approximately 40 feet. A rectangular block of solid mass with curved edges at the west and east ends slid into the trench. (Ex. W; Tr. 107, 133, 347-348) There was a uniform cave-in for the 40 feet length. (Tr. 354) The cave-in was in front and behind the shield as well as beside it. (Tr. 133) This block of soil mass sheared vertically at the junction along the south side of the natural gas line to a depth of approximately 12 feet and had an inclined failure surface extending to a depth of 19 feet, or approximately 5 feet below the shield. (Ex. W; Tr. 139, 347-348) The block of soil mass on the top of the collapse had a rigid body movement with very little crushing of the soil. (Ex. W; Tr. 349) The soil slid downward and into the sewer

line trench. (Tr. 327, 349) The shield caught the top soil. (Tr. 137)

(See Illustration reproduced on page A-15)

An investigation conducted by an expert in soil dynamics, soil analysis and soil mechanics revealed that the cave-in occurred because of the simultaneous occurrences of several conditons, namely: (Ex. W; Tr. 394-396)

(1) The soil between 12 and 19 feet was a slightly reddish fine silty sand which had very little cohesion. Soil was friable even under finger tips.

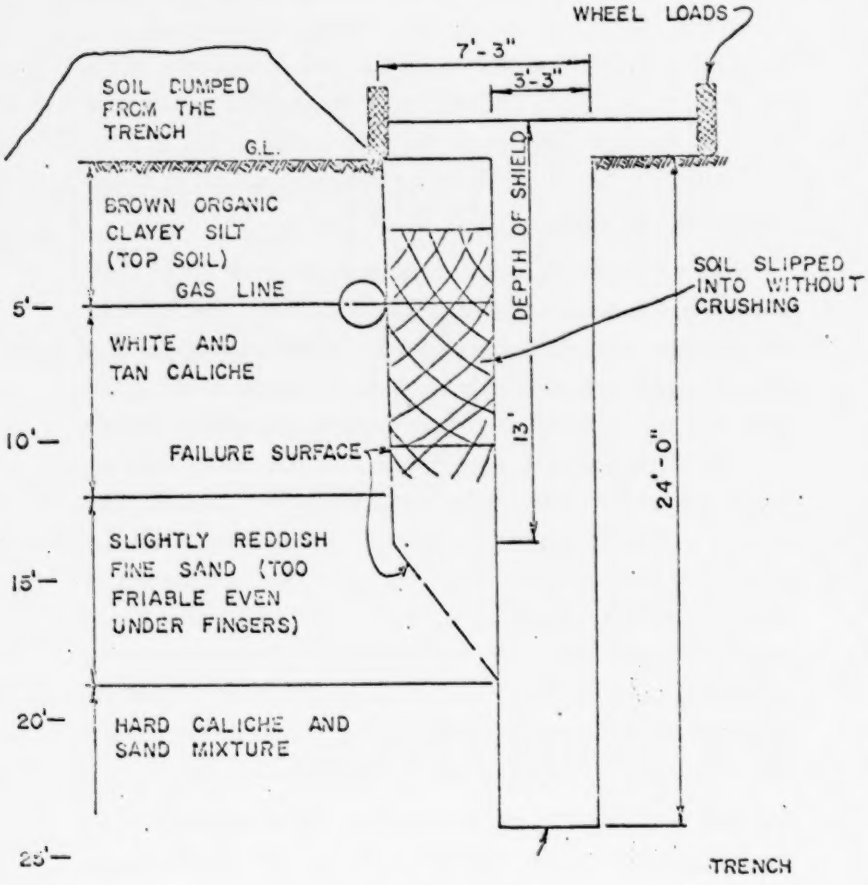
(2) The moisture content of the fine sand between 12 and 19 feet was particularly high and resulted in low shear strength.

(3) The construction of the trench for the existing gas line at 4 feet away created a weak vertical plane. The bond between the filled-in soil in the trench and the original undisturbed soil was so small as to cause a top tensile zone in soil, as the sewer trench was cut.

(4) The wheel carrying the weight of the shield and gravel hopper acted as a concentrated load at the above vertical plane.

As long as the four foot column of soil between the gas line and the sewer trench held, there was no chance of a cave-in. However, once the column broke loose the weight was shifted to the white and tan caliche, which in turn failed. The weight was then shifted to the slightly reddish fine sand which also failed. (Tr. 407-408)

The scene of the cave-in is illustrated as follows:



Soil conditions in Lubbock County vary. (Tr. 295) In general the soil is regarded by utility contractors and those associated with such work as being stable for installing water or sewer lines. (Tr. 80-81, 83, 85, 316, 399-400, 435-437, 455, 458, 477, 486-487) Shoring the full length of a trench has not been deemed necessary by utility contractors in excavating trenches in Lubbock County. Any shoring done in the area has been only with respect to the first 8 or 10 feet of the trench. (Tr. 80, 86-87, 285, 462-463) The soil being excavated on 82nd Street at the time of the cave-in was stable. (Tr. 85, 316, 319-320, 399) It is also described as cemented sand and gravel. (Tr. 399-400)

Dragoo was aware of the requirements of 29 CFR 1926. 652(b) and (e) when planning and designing the Lubbock sewer project. He did not consider the area in which the pipe was to be laid to consist of unstable or soft material except for a stretch only 82nd Street from Memphis Avenue to Quaker Avenue which had been an old lake bed. The trench was approximately 8 to 10 feet deep in this area. (Tr. 290-292) This area was excavated with a backhoe in lieu of using the ladder trencher. The walls were supported by hydraulic gang shores for approximately one half a mile. (Tr. 39, 292) The area was located a mile east of the accident scene. (Tr. 291) Shoring was always available on the project in the event it was determined to be necessary for completing any part of the sewer line. (Tr. 308)

Prior to the cave-in on January 18, 1972, respondent had three instances in which a cave-in was prevented by the shield. The first occurred on 58th Street near the beginning of the

project and occurred after an extremely heavy rain. There was a large drainage ditch on the north side of the sewer ditch which held a considerable amount of water and contributed to the difficulty. The project was shut down because of the rain for approximately a week. When respondent again commenced laying pipe the soil to a depth of approximately 4 or 5 feet split out and leaned over a couple of inches into the shield, which contained the soil. (Tr. 32-33, 53, 336) The ditch at the time was approximately 17 or 18 feet deep. (Tr. 33)

The second instance of a near cave-in also occurred on 58th Street and was due to inundation of the ditch by water through an existing manhole. The soil split approximately 5 or 6 feet deep from the surface downward and leaned into the protective shield, which held the soil. (Tr. 33-34, 53, 336) The third instance occurred on Memphis Avenue. There was a small water line within 5' of the center of the sewer line. (Tr. 34, 108) The water line had been installed within two months of the installation of the sewer line at that location. (Tr. 37) The soil split approximately 5 feet deep from the surface and leaned into the protective shield, which contained it. (Tr. 34, 53, 336) The water line was exposed by the splitting of the soil. (Tr. 34) The third instance was approximately two miles from the cave-in on 82nd Street. (Tr. 34-35) It was caused by a backfill loader shearing off the column of undisturbed soil between the water line and the sewer line. (Tr. 107-108) There was approximately 3' of undisturbed soil between the two lines. (Tr. 108)

After the accident on January 18, 1972, the project was ceased until February 14, 1972. Pipe was not laid again until February 16, 1972. The shield was extended to the bottom of

the trench and the load bearing of the wheels to the trench was spread out by installing athey tracks on it in lieu of wheels. (Tr. 193-194, 333)

Subsequent to the cave-in it was discovered that the gas line was not in the position along 82nd Street as had been indicated by the city plat. The center of the gas line was actually only 26' 5½" from the center of 82nd Street. (Ex. II; Tr. 504-506) The City of Lubbock determined that the sewer line as installed by respondent was in its proper location. (Tr. 144-145)

Compliance Officer Herbert M. Kurtz conducted an investigation of the cave-in between Quaker and Slide roads on January 18 and 19, 1971. (Tr. 161-162) He was on the scene approximately one hour after the cave-in. (Tr. 236) He did not identify himself when he first arrived but did later in the afternoon tell the superintendent who he was. (Tr. 236-237) He met with officials of respondent for the first time on January 20, 1972. No one was at the scene when he went out there on January 19, 1972. (Tr. 237) He was accompanied on the inspection on January 19, 1972, by the area director. (Tr. 240)

A serious violation was determined by the compliance officer and concurred in by the area director. He took into account the depth of the trench and the fact that the shield was approximately 10 feet from the bottom of the trench. He concluded that a cave-in would result in serious physical harm or death to the employees. (Tr. 229-230, 240) The gravity of the violation was also taken into consideration. (Tr. 233)

A penalty of $500.00 was proposed for the alleged violation. In arriving at the penalty of $500.00, the complainant com-

menced with an unadjusted penalty of $1000.00 and allowed a 50 percent reduction. Respondent was allowed a 20 percent reduction for previous history, a 20 percent reduction for good faith and a 10 percent reduction for size. (Tr. 230-232, 241-242) The gravity of the violation was also taken into consideration in arriving at the proposed penalty of $500.00. (Tr. 233)

LAW AND OPINION

1. *Jurisdiction*

The first issue for determintaion involves the question of whether respondent was engaged in a business affecting commerce within the meaning of the Act. Unless respondent affects commerce within the intendment of the Act, the Act would have no applicability to its operations.

The respondent's position on this issue is essentially set forth as its Proposed Finding of Fact No. XXIV, which states:

> Respondent's only office is located in Lubbock, Texas. The only job Respondent was engaged in at all times pertinent hereto is for the City of Lubbock, Texas. The materials, supplies and equipment used on this job by Respondent were secured from within the State of Texas. No portion of this job ran outside Lubbock, Texas, or served any person, business or agency outside the State of Texas.

The proposed findings are supported by the record except for the findings that the materials, supplies and equipment used on the job by respondent were secured from within the State of Texas and that no portion of the job served any person, business or agency outside the State of Texas. The record does not disclose where the materials, supplies and equipment used on

the job were secured. Without such facts it is not possible to conclude whether any portion of the job served any person, business or agency outside the State of Texas.

Section 3(3) and 3(5) of the Act, which are applicable to this question, provide:

Sec. 3. For the purpose of this Act —

* * *

(3) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof.

* * *

(5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.

In evaluating the principles as stated in earlier cases, one must bear in mind the changing attitudes of the courts in recent years, as well as the likelihood that the applicable legislation differs in its terms from the law applicable to those decisions. "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce." *McLeod v. Threlkeld*, 319 U.S. 491, 495 (1943) Prime consideration must be given to the objective of Congress and the evil it sought to remedy.

The Act specifically indicates that Congress intended to invest in the complainant the fullest jurisdictional breadth constitutionally permissible under the Commerce clause. Congress

plainly states in Section 2 of the Act that personal injuries and illnesses arising out of work situations impose a substantial burden upon and are a hinderance to interstate commerce. It further declares in Section 2 that its purpose and policy in enacting the legislation was to assure so far as possible *every working man and woman* in the nation safe and healthful working conditions through the exercise of its power to regulate commerce among the States. The application of the Act was not made to depend upon the fortuitous circumstances that a particular employer is engaged in interstate commerce.

The determining factor under Section 3(5) is not whether an employer is engaged in commerce but whether its busines affected commerce. The selection of the term "affecting commerce' 'in lieu of engaged in or some similar term is significant in the resolution of this issue. The word affect has the widest conceivable scope both from "its dictionary definition and its judicial interpretation. The dictionary says: 'To act upon; produce an effect on; touch', and the cases are equally unanimous in emphasizing this inclusive character and so hold it to mean 'acting upon', 'working a change in' or 'concerning'." *N.L.R.B. v. Suburban Lumber Co.*, 121 F. 2d 829, 832 (3rd Cir. 1941) By the use of the term "affecting commerce" it is concluded that Congress intended to regulate not merely employers involved in transactions or goods directly moving in interstate commerce but also indirect activities which in isolation might be deemed to be merely local but in the interlacing of business across state lines adversely affect commerce.

The Supreme Court has long recognized that the commerce power is not confined in its exercise to the mere regulation of

commerce among the States. "It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) The reach of the power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power. *United States v. Wrightwood Dairy Co.*, supra.

Under the Act the complainant is authorized to set mandatory occupational safety and health standards applicable to businesses affecting commerce. These standards in most instances mean additional costs to the employer. For instance, in the case of a utility contractor who is required to shore, brace or slope sides of trenches there is certainly additional costs involved in carrying out the provisions of 29 CFR 1926.652(b). A utility contractor who is not required to comply with these standards (assuming the trenches in both cases were in unstable or soft material) would have an economic advantage in competing with a utility contractor who is required to comply with the standards.

The utility contractor who does not have to comply could force competitors engaged in interstate commerce to surrender the market or reduce prices in order to obtain it. This would tend to affect adversely the intent of Congress. Workers for employers engaged in interstate commerce could conceivably lose their jobs and have to work for intrastate employers. (Obviously Congress was aware of this problem when it used

the term "affecting commerce.") Under such circumstances the national power to establish safety standards extends to such control over intrastate transactions as is necessary and appropriate to make the regulation of the interstate commerce effective. See *United States v. Wrightwood Dairy Co.*, supra, wherein the Supreme Court concluded that the national power to regulate the price of milk moving interstate into the Chicago marketing area extended to control over intrastate transactions there as was necessary and appropriate to make the regulation of the interstate commerce effective. In *Wrightwood Dairy* the marketing of intrastate milk affected the price structure of interstate milk. The same economic analogy appears applicable with respect to requiring the respondent to comply with the safety standards.

The facts of this case plainly reveal that there was also a more direct involvement in interstate commerce. The activities of respondent had a close, intimate, and substantial relation to trade, traffic and commerce among the states. Its activities with respect to management consulting service and construction extended over and across State lines. During its 2½ year existence it completed a river control project in Nebraska, a sewer line project in Lubbock, Texas, and rendered consultative services to firms in Lubbock, Texas, and Joliet, Illinois. Where the general activities of a corporation extend over and across state lines, it has been held to affect interstate commerce. *National Labor Relations Board v. Kinner Motors*, 152 F. 2d 816 (9th Cir. 1946)

The record is also quite clear that correspondence, plans and specifications, which were vital to respondent's operations, were

transmitted across state lines. Where mails and instrumentalities of interstate commerce are vital to the functioning of the company they are deemed to be engaged in interstate commerce. *North American Company v. Securities & Exchange Commission*, 327 U.S. 686 (1946) "Interstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution." *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 128.

2. *Legality of Inspection Procedure*

Respondent submits that the inspection preceding the issuance of the Citation for Serious Violation and proposed penalty was illegal and void and that consequently the Citation for Serious Violation and proposed penalty are illegal and void. This argument is predicated on respondent's contention that the compliance officer did not present his credentials to any agent, servant or employee of respondent, explain the nature and purpose of the inspection or indicate the general scope of his inspection to respondent. (Res. Proposed Findings of Fact No. XIII)

Section 8(a) of the Act provides as follows:

> (a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized —
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reason-

> able limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

The inspection procedure is further controlled by subsection (e) of Section 8, which provides, in part, as follows:

> (e) Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection.

In addition subsection (g)(2) of Section 8 authorizes the complainant to prescribe such rules and regulations dealing with the inspection of an employer's establishment as he deems necessary.

Pursuant to authority under the Act the complainant has promulgated regulations concerning the inspection procedure. Section 1903.7(a) of 29 CFR provides, in part, as follows:

> ***At the beginning of an inspection, Compliance Safety and Health Officers shall present their credentials to the owner, operator, or agent in charge at the establishment; explain the nature and purpose of the inspection; and indicate generally the scope of the inspection***.

Subsection (f) of Section 1903.7 states that "[I]nspections shall be conducted in accordance with the requirements of this part." Section 1903.8(a) of 29 CFR further provides, in part, as follows:

> ***A representative of the employer and a representative authorized by his employees shall be given an opportunity

to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace for the purpose of aiding such inspection.***

Complainant has also issued procedural guidelines in a Compliance Operations Manual, dated November 15, 1971, and released January 4, 1972. Chapter V of the manual covers general inspection procedures. This chapter, among its many provisions, provides:

D. 2. *Refusal to Permit Inspection-Warrants*

a. ***The CSHO shall tactfully present his credentials to the owner, operator or agent in charge at the establishment and explain generally the nature and purpose of his visit. He should further explain generally the scope of the inspection and the records he wishes to review.

* * *

E. *Opening Conference*

1. *Purpose*

At his interview with the employer or his designated representative, the CSHO shall:

a. Inform the employer that the purpose of his visit is to make an investigation to ascertain whether the employer is in compliance with the requirements of the Act.

b. Outline in general terms the scope of the inspection, including records he may desire to review (See paragraph F.2.c of this Chapter), employee interviews, physical inspection of the worksite or workplaces, and the closing conference with the employer or his designated representative to discuss the inspection findings.

c. Give the employer copies of laws, standards, regulations, and promotional materials as applicable.

* * *

f. At an appropriate time during the opening conference, the CSHO should discuss the walkaround provisions under the Act, (See Paragraph F.1.d of this Chapter). The employer should be asked to designate his representative for walkaround purposes.

F. *Establishment Inspection*

1. *Employer and Employee Representatives*

a. Section 8(e) of the Act and 29 CFR Section 1903.8 of the compliance regulations require that a representative of the employer and a representative authorized by the employees shall be given an opportunity to accompany the CSHO during the physical inspection or any workplace for the purpose of aiding such inspection.***

The compliance officer testified that he made his inspection on January 18 and 19, 1972. (Tr. 161-162) Photographs introduced into evidence by complainant were taken on those dates. (Tr. 162, 167) The following testimony of the compliance officer clearly reflects that the inspection was completed prior to his contacting any representatives of the respondent: (Tr. 236-238)

THE COURT: How soon after the accident were you there?

THE WITNESS: Approximately one hour.

THE COURT: Had you come to the scene as a result of a telephone call from someone —

THE WITNESS: No, sir.

THE COURT: Or news announcement? How did you happen to be there that soon?

THE WITNESS: I was making an investigation close to that

area when we heard that they had a cave-in on 82nd Street.

THE COURT: So you went over?

THE WITNESS: So I went over to see what had taken place.

THE COURT: Who did you contact when you were there on the 18th?

THE WITNESS: On the 18th I did talk to Mr. Conklin that afternoon late, who was the superintendent at the job.

THE COURT: In other words, did you identify yourself to Mr. Conklin?

THE COURT: Yes, sir, I told him who I was.

THE COURT: When you first got there?

THE WITNESS: No, sir, later, because it was such a state of confusion over there. You really couldn't tell who was the contractor and who was in charge, there were so many people, until I started asking questions and found out who the superintendent was.

THE COURT: Shortly after you got there, did you identify yourself?

THE WITNESS: I don't know, it might have been an hour or so go by until I did.

THE COURT: Then after you identified yourself, did you conduct an inspection with anyone with the company?

THE WITNESS: No, sir, I did not do anything with the company until later.

THE COURT: Well, where (sic.) did you do anything with the company?

THE WITNESS: I believe it was on the 20th that I met with Mr. Dragoo and Mr. Bill Conklin.

THE COURT: Who did you contact when you went back on the 19th?

THE WITNESS: There was no one out there at the time.

THE COURT: So you didn't contact anyone for the company on the 19th either?

THE WITNESS: No, sir.

THE COURT: The 20th was the first contact you had with the company to discuss inspection with them.

THE WITNESS: The probability, yes, sir.

The Act recognizes that government personnel must have the right of entry in order to carry out an effective national occupational safety and health program. Congress conferred broad powers of investigation subject to two basic requirements.

Section 8(a) of the Act authorizes an inspection by a compliance officer "upon presenting appropriate credentials to the owner, operator or agent in charge." Subsection (e) of Section 8 requires that a representative of the employer be given an opportunity to accompany the compliance officer during the physical inspection of the workplace. These basic requirements are mandatory rather than directory. It is obvious that Congress did not intend that compliance officers would conduct their inspections prior to formally contacting the employer presenting proper credentials, advising him of the inspection and affording a reresentative of the employer an opportunity to accompany the compliance officer.

The resolution of this issue requires that the interests of the complainant be balanced against the rights of the respondent. The record is quite clear that complainant did not follow the express provisions of the Act, the regulations promulgated by him or the procedural guidelines issued in the Compliance Operations Manual. An employer is entitled to adequate protection against such excessive zeal of compliance officers. As the Second Circuit said in *Hammond v. Lenfest* 398 F. 2d at 715, departures from an agency's procedures "cannot be reconciled with the fundamental principle that ours is a government of laws, not men."

The law on this issue is quite clear. The court in *United States v. Heffner*, 420 F. 2d 809 (4th Cir. 1969), wherein the Internal Revenue Service failed to follow procedures it issued to its special agents, stated: (Pages 811 and 812)

> An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down. This doctrine was announced in United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954). There, the Supreme Court vacated a deportation order of the Board of Immigration because the procedure leading to the order did not conform to the relevant regulations. The failure of the Board and of the Department of Justice to follow their own established procedures was held a violation of due process. The Accardi doctrine was subsequently applied by the Supreme Court in Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed. 2d 1403 (1959), and Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed. 2d 1012 (1959), to vacate the discharges of government employees.
>
> * * *
>
> It is of no significance that the procedures or instructions

> which the IRS has established are more generous than the Constitution requires. In Service v. Dulles, supra, the Supreme Court vitiated the discharge of a foreign service officer because of the State Department's failure to follow its own procedures. The Court concluded that it made no difference that the State Department had no statutory or constitutional obligation to establish the procedure in question:
>
> > While it is of course true that * * * the Secretary was not obligated to impose upon himself these more rigorout substantive and procedural standards, * * * having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.
>
> 354 U.S. at 388, 77 S.Ct. at 1165. See also Vitarelli v. Seaton, supra.

The Fourth Circuit further points out that the doctrine's purpose is to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures.

In *Hollingsworth v. Balcom*, 441 F. 2d 419, 421 (6th Cir. 1971), the court stated "that administrative rules and regulations must be followed in order to comply with the requirements of basic fairness implicit in the concept of due process of law." The court in *Bluth v. Laird*, 435 F. 2d 1065, 1071 (4th Cir. 1970) wherein the Army disregarded its regulations with respect to temporary deferments from overseas duty, stated:

> "***The problem is only one aspect of the broader rule that when the sovereign has established rules to govern its own conduct it will be held to the self-imposed limitations on its own authority, departure from which denies procedural due process of law."

In this case the complainant, in addition to violating his own regulations and procedural guidelines, violated express provisions of the Act. The compliance officer did not present his

credentials or advise representatives of the respondent that he was conducting an investigation. When he contacted representatives of the respondent on January 20, 1972, his investigation had been completed. The respondent was accordingly denied an opportunity to designate anyone to accompany him on the inspection. More importantly, the compliance officer was essentially a trespasser while conducting his investigation. Since the respondent had not been advised of the investigation, it can not be assumed that the investigation was conducted with respondent's knowledge.

Fairness and procedural due process necessitates that an employer be advised whenever his workplace is being inspected or investigated. Congress recognized this by providing that the complainant could enter the workplace "upon presenting appropriate credentials." Congress also gave the employer an opportunity to designate someone to accompany the complainant or his authorized representative during the physical inspection of the workplace. These are substantial and basic rights. Denial of these substantive rights cannot be condoned. The complainant must observe the provisions of the Act and regulations promulgated thereunder. An employer has the right to expect the complainant to adhere to the provisions of the Act and regulations applicable to his conduct in the same manner as the complainant expects the employer to comply with those provisions applicable to an employer's conduct.

CONCLUSIONS OF LAW

1. The respondent was at all times material hereto engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

2. The respondent was at all times material hereto subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter herein.

3. Complainant violated Section 8(a) and (e) of the Act, as well as his regulations and procedural guidelines, by failing to advise respondent of the inspection until it was completed. Such actions violated basic fairness and procedural due process inherent in the Act.

4. The violation of basic fairness and procedural due process requires that the Citation for Serious Violation and proposed penalty be vacated.

ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, it is

ORDERED:

That the Citation for Serious Violation and Notification of Proposed Penalty issued to respondent on January 27, 1972, are hereby vacated and this proceeding is dismissed.

Dated this 25th day of October, 1972.

James D. Burroughs, Judge, OSHRC

EXHIBIT B

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

ACCU-NAMICS, INC.,

Respondent.

OSHRC DOCKET No. 477

DECISION

Before MORAN, Chairman; VAN NAMEE and CLEARY, Commissioners.

CLEARY, Commissioner:

On October 25, 1972, Judge James D. Burroughs issued his decision and order in the present case, vacating the Secretary's citation for serious violation and proposed penalty of $500.

On November 21, 1972, the Commission directed that the decision and order of the Judge be reviewed by the Commission in accordance with section 12(j) of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 *et seq.*, hereinafter "the Act").

The Commission has reviewed the entire record in this case, including the exhibits and briefs of the parties. We adopt the Judge's decision only to the the extent that it is consistent with the following.

I.

Respondent, a Texas corporation, was engaged in the business of installing underground water and sewer pipes for the city of Lubbock, Texas. Among the projects undertaken by respondent was the installation of about 14,700 feet of sewer line in a single trench that varied in depth from 8 to 28 feet and in width from 28 to 39 inches. Normal operations consisted of staking the line, preparing a suitable surface on which to operate the trenching machine, trenching the ditch to the necessary depth, installing the pipe, setting of a manhole if required in a particular location, handling of embedment material, stringing pipe, backfilling, water jetting of the backfill material, and cleanup.

The primary piece of protective equipment used by respondent was a portable steel frame and steel-sheeted box, referred to as a trench shield, which was designed and manufactured by respondent. The trench shield was devised to extend downward into a ditch to a depth of 14 feet; it was 22 feet long and its width could be varied from 28 to 44 inches, depending on the width of the trench. Although the trench shield was designed for several purposes; its major purpose was to protect workers from a cave-in.

By January 18, 1972, about three-fourths of the trenching operation had been completed without incident. On the afternoon of January 18th, however, a cave-in occurred in which four workers were killed. At the point of the cave-in the trench was 24 feet deep. Therefore, there were 10 feet of unprotected trench wall between the underside of the trench

shield and the bottom of the trench, for the trench shield extended downward only 14 feet. No additional shoring, bracing or other protective measures were used in the trench.

The cave-in was caused by soft dirt (caliche or calcium carbonate) slipping underneath the trench shield, which resulted in the side wall collapsing into the trench. Two of the workers were working inside the trench shield at the time of the accident. The other two workers, contrary to company instructions, but with the knowledge and approval of the foreman, were working outside the trench shield. Instead of being ordered to work within the protection of the trench shield, they were told to stay as close as they could to the inside of the trench shield.

About one hour after the cave-in, a compliance officer who was in the area and had heard about the accident came over to the worksite, which was along (10 feet south of the pavement edge) 82nd Street, a public street. A large crowd had gathered at the site and a general state of confusion existed. The compliance officer did not identify himself to the superintendent when he first arrived, but later in the afternoon he did inform the superintendent who he was.

The work area was inspected again on the following day, Wednesday, January 19, 1972, but no one was at the scene. The compliance officer first met with company officials to discuss the accident on Thursday, January 20, 1972. At no time did the compliance officer seek the aid of the employer and the employees by having their representatives accompany him during the inspection of the workplace.

On January 27, 1972, respondent was cited for an alleged serious violation for failure to comply with 29 CFR §1926. 652(b) and (e) and 29 CFR §1926.653(p).[1] A notification of proposed penalty of $500 was issued on the same date. The citation described the alleged violations as follows:

> Employees working in trench equipped with portable trench shield to install a sewer line 21" in diameter of Flex Tran RPM pipe of 10 and 20 foot sections. Trench was 24.3 feet deep at STA 94 + 20 with vertical sidewalls. The portable trench shield being used was 22 feet long and extended 14.25 feet into the trench from ground level, thus exposing employees working in bottom of the trench to 10 feet of unshielded trench sidewalls.
>
> The bottom 21 feet of trench was caliche (calcium carbonate) a soft material. The bottom of the trench was not adequately shored, sheeted, braced, sloped or otherwise supported by means of sufficient strength to protect employees working at the bottom of the trench as required in 1926.625(b).

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[1] The cited standards read as follows:

1. §1926.652 Specific trenching requirements.

* * *

(b) Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2 (following paragraph (g)) of this section.

* * *

(e) Additional precautions by way of shoring and bracing shall be taken to prevent slides or cave-ins when excavations or trenches are made in locations adjacent to backfilled excavations, or where excavations are subjected to vibrations from railroad or highway traffic, the operation of machinery, or any other source.

* * *

2. §1926.653 Definitions applicable to this subpart.

* * *

(p) "Trench shield" — A shoring system composed of steel plates and bracing, welded or bolted together, which support the walls of a trench from the ground level to the trench bottom and which can be moved along as work progresses.

Additional precautions by means of shoring or bracing were not taken to prevent slides or cave-ins along the trench as a result of a backfill excavation, a gas line, exisisting 5 feet deep, 5.5 feet north of the center line of excavated trench as required in 1926.652(e).

The above mentioned portable trench shield does not meet the definition requirement as stated in 1926.653(p) wherein shoring will support the walls of a trench "to the trench bottom", and therefore does not offer protection required in 1926.652(b) and (e).

A hearing was convened on May 30, 1972, at which time the parties were afforded an opportunity to present evidence as to the existence of the alleged violation. Thereafter, on October 25, 1972, Judge James D. Burroughs issued his decision. Judge Burroughs vacated the citation and proposed penalty finding that the Secretary did not comply with sections 8(a) and (e) of the Act, as well as his own regulations and procedural guidelines, by failing to advise respondent of the inspection until it was completed.

II.

The critical portion of section 8(a) of the Acts reads as follows:

8(a) In order to carry out the purposes of this Act, the Secretary, upon *presenting appropriate credentials to the owner, operator, or agent in charge, is authorized* —

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by a employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of em-

> ployment and all pertinent conditions, structures, machines apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agency or employee. (Emphasis added).

This text was inserted in the Act because it was recognized that government officers must have a right of entry in order to carry out an effective national occupational safety and health program. *S. Rep.* No. 91-1282, 91st Cong. 2d Sess., 11 (1970). The obvious purpose of the language emphasized above was to write into the Act the authority of the Secretary of Labor to conduct inspections and a directive to the Secretary that he must comply with "applicable constitutional protections." As Congressman Steiger, co-sponsor of the Act, stated:

> I would add that in carrying out inspection duties under this Act, the Secretary, of course, would have to act in accordance with applicable constitutional protections.

Staff of Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* 1077 (Com. Print 1971).

The Supreme Court in the companion cases of *Camara* v. *Municipal Court*, 387 U.S. 523 *(1967)* and *See* v. *Seattle*, 387 U.S. 541 (1967) firmly established that Fourth Amendment protections are applicable to administrative inspections of both non-commercial and commercial premises. As expressed in these cases, administrative inspection warrants are required under ordinary circumstances. A warrant is *not* needed, however, for an administrative inspection where a workplace is open to the public. In *See*, the Court stated:

> [A]dministrative entry, without consent, upon the portions of commercial premises *not open to the public* may only be compelled through prosecution or physical force within the framework of a warrant procedure.

387 U.S. at 545 (emphasis added).

The converse of the quoted passage, that a warrant is not required where the premises are open to the public, is consistent with the well-settled rule that merely observing what is open to public view does not constitute a search. *See Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971).

In *United States* v. *Cain,* 454 F.2d 1285 (7th Cir. 1972), the defendents were convicted of violating the Migratory Bird Treaty Act, 16 U.S.C. §701 *et seq.* (1960) and a regulation promulgated thereunder. On appeal, the defendants argued that the warrantless search of their hunting club violated the Fourth Amendment. In affirming the convictions, the Seventh Circuit quoted the following from *McDowell* v. *United States,* 383 F.2d 599, 603 (8th Cir. 1967):

> Although the Supreme Court has recently expanded the Fourth Amendment protection of the business enterprise, *See* v. *Seattle,* 387 U.S. 541, 87 S. Ct. 1737, 18 L.Ed.2d 943 (1967), it has not expanded such protection beyond that which a private dwelling and the curtilage thereof is likewise entitled. Therefore, a search of open fields, without a search warrant, even if such fields are construed as part of a commercial enterprise, is not constitutionally "unreasonable."

454 F.2d at 1287. *See also United States* v. *Sorce,* 325 F.2d 84, 86 (7th Cir. 1963).

An important factor to consider is whether an individual or

business has a reasonable expectation of privacy, even if the individual or business is in an area that is open to the public. In *Katz* vs. *United States*, 389 U.S. 347 (1967), the Supreme Court reversed a conviction for interstate gambling in which the government's evidence was obtained by electronic eavesdropping of a telephone conversation made from an enclosed, coin-operated phone booth. The Court stated:

> What a person knowlingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection . . . . but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

389 U.S. at 351 (citations omitted). *Accord United States* v. *White*, 401 U.S. 745, 752 (1971).

In the present case trenching operations were being conducted along a public street in order to lay a municipal sewer pipe line. The work area was accessible to the public and completely open to public view. Under these circumstances, respondent had no reasonable expectation of privacy and the compliance officer did not need a warrant to enter respondent's worksite. Once on the worksite, he merely observed that which any other person could have observed.

We construe section 8(a) concerning the presentation of credentials to be mandatory only when the Fourth Amendment would bar a warrantless search and thus when notice of authority is required. Inasmuch as the workspace was open to the public view, there was no mandatory requirement that credentials be presented, and there was no abuse in discretion in failing to do so.

III.

Even if there were a requirement that credentials be presented in the present case, in our view the compliance officer substantially complied with this requirement. The obvious purpose of presentation of credentials is identification. The record indicates that within about one hour after arriving at the jobsite, the compliance officer verbally identified himself to respondent's foreman. The mechanical task of displaying one's official credentials merely constitutes the corroboration of a verbal identification. Although "presentation of credentials" is the express statutory term of section 8(a), it is only one means of identification. The essential objective of identification at the earliest practical opportunity has been satisfied.

IV.

Although we have concluded that there was no failure to comply with section 8(a) in this case we would reach the same result even if section 8(a) were to be read literally, and there were a technical failure to comply. Even if the evidence obtained by means of the investigation were not considered, the violations would still be supported by preponderant evidence, and its admisison would at most be harmless error.[2]

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[2] The application of the harmless error doctrine by administrative agencies is mandatory. 5 U.S.C. §706 (1967); *Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453, 465 (D.C. Cir. 1967).

The Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967) stated that harmless error of a constitutional nature must be harmless beyond a reasonable doubt and in order to find harmless error there can be no reasonable possibility that it contributed to the conviction. *Accord Harrington v. California*, 395 U.S. 250 (1969). Even though this criminal law standard greatly exceeds the Commission's "preponderance of the evidence" test, *see Armor Elevator Co.*, Nos. 425 & 426 (November 20, 1973), there is sufficient evidence to find a violation even under the

Several of respondent's employees and former employees gave testimony as part of the Secretary's case-in-chief that clearly substantiates allegations against respondent. Respondent's president-general manager testified that a trench shield designed and built by respondent was used in the trench as a means of protection. This device did not conform to the safety standards; the primary defect was that it only extended 14 feet down into a trench that was 24 feet deep. Expert testimony indicates that this was the cause of the cave-in. In addition to this testimony, other of respondent's employees testified that there was no shoring, bracing, sloping, or hydraulic jacks used on the site. Finally, expert testimony concerning soil samples taken on February 14th indicates that the soil was of a soft, unstable nature.

V.

Respondent has also suggested that presentation of credentials is required in all instances by the Secretary's own regulations and that a failure to comply with these regulations necessitates the vacating of the citation. The material in the *Compliance Operations Manual* and in 29 CFR §1903.7(a) on this subject does nothing more than implement the requirements of section 8(a) in a manner consistent with the Fourth Amendment. It is thus consonant with the thrust of this decision.

Finally, respondent argued, and the Judge agreed, that the citation should be dismissed because respondent was not afforded a "walkaround," as provided for in section 8(e) of the Act.

Chapman-Harrington test. Moreover, even in criminal cases, evidence seized in violation of the Fourth Amendment and introduced at trial has been held to be harmless. *See, e.g., United States v. Steinkoenig,* 487 F.2d 225, 230 (5th Cir. 1973); *United States v. West,* 486 F.2d 468, 473 (6th Cir. 1973).

The Judge's decision concerning the application of section 8(e), however, preceded the Commission's decisions in *Chicago Bridge & Iron Co.*, No. 224 (January 19, 1973) and *Wright-Schuchart Harbor Contractors,* No. 559 (February 15, 1973). In these cases, the Commission dealt extensively with the "walk-around" provision of section 8(e) of the Act. Those decisions hold that the text of section 8(e) is directory rather than mandatory. Nevertheless, there is an expectation that the Secretary will make every reasonable effort to afford an opportunity of accompaniment to authorized representatives of both employees and employers.

In the present case it is clear that accompaniment by these representatives could have aided in the inspection. The compliance office had never engaged in any pipeline work, dug any ditches, manufactured any pipes, and had no experience in pipeline work in the area. Under these circumstances, it is reasonable to infer that any contribution by the authorized employer and employe representatives at that time would have been beneficial for all concerned.

Notwithstanding the salutary effects that an inspection tour accompaniment or "walkaround" would have provided, it is unreasonable to expect that there will be a "walkaround" when it is highly impractical. On the day of the initial inspection, no "walkaround" was possible because the cave-in had caused a state of excitement and general confusion. On the following day, when the compliance officer returned to the scene of the accident, there was no one present. A "walkaround" was thus impossible. On the third day of inspection, the compliance

officer met with respondent, but no employees were on the jobsite.

Finally, in *Chicago Bridge & Iron Co., supra* and *White-Schuchart, supra,* we held that there must be a showing of prejudice to the employer before the Commission will invoke the extreme sanction of vacating a citation for failure to comply with section 8(e). In this context, "prejudice means actual prejudice to a defendant's [employer's] ability to present an effective defense." *United States v. Menke,* 339 F. Supp. 1023, 1026 (W.D. Pa. 1972). In the present case there has been no allegation that respondent was prejudiced by a failure to accompany the inspection tour.

VII.

Judge Burroughs issued his decision in this case without ever reaching the merits of whether or not the cited violation did exist. Nevertheless, both parties were afforded a right to present fully their evidence. We note that the transcript is copious, the exhibits complete, and the Judge's findings of fact detailed. To remand such a case, therefore, is unnecessary and can only prolong unduly the disposition of this matter.

Upon a thorough examination of the record, we conclude that respondent was in serious violation of the Act. In so doing, we specifically adopt the Judge's findings of fact. We also agree with the Secretary's determination that the violation be characterized as serious. Four of respondent's employees were fatally injured as a result of the cave-in. In addition, respondent knew or should have known that the trench shield alone was an inadequate means of protection,

that the soil was unstable, and that a cave-in could result. Thus, the criteria for a serious violation as expressed in section 17(k) have been met.

With respect to the penalty, section 17(j) of the Act provides that the Commission shall give due consideration to the size of the business, the gravity of the violation, the good faith of the employer, and the history of previous violations. Having considered these factors, we accept the advice of the Secretary, and assess a penalty of $500.

Accordingly, it is ORDERED that the Judge's decision and order be set aside and that the citation and penalty proposed by the Secretary be affirmed.

Dated: May 30, 1974

FOR THE COMMISSION

/s/ William S. McLaughin

William S. McLaughin
Executive Secretary

VAN NAMEE, Commissioner, Concurring

I concur with Commissioner Cleary's disposition of this case.

Section 8(a) of the Act does incorporate the protections of the Fourth Amendment and Complainant's compliance therewith is mandatory where the inspected employer entertains a reasonable expectation of privacy. *Katz v. United States,* 389 U.S. 347 (1967). Assuming without deciding both that Respondent had a reasonable expectation of privacy and that a timely motion to suppress was made, the evidence of record, independent of that which presumably could be suppressed, is sufficient to sustain Complainant's citation for serious violation and support the penalty assessed for such violation.

MORAN, Chairman, dissenting:

I dissent. Judge Burroughs reached the proper result in this case in a carefully reasoned opinion with which I am in agreement. Neither the purposes of the Act nor the individual rights of either employers or employees as guaranteed by the Act are enhanced by the decision of the majority. For a more detailed exposition of my views on the complainant's responsibility to follow the plain language of both the Act and his own regulations see my recent dissent in *Lipsky and Rosenthal, Inc.*, OSAHRC Docket No. 690 (May 13, 1974).

ACCU-NAMICS, INC., Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, Secretary of Labor, and John T. Dunlop, Respondent.

No. 74-2979.

United States Court of Appeals, Fifth Circuit.

July 11, 1975.

Employer which had been found guilty of serious violation of the Occupational Safety and Health Act sought review of final order of the Occupational Safety and Health Review Commission. The Court of Appeals, Dyer, Circuit Judge, held that even if Secretary of Labor had violated the Act by failing to provide walk-around privileges to employer and employee representatives at the scene of the accident and by compliance officer's failure to identify himself immediately upon arriving at the scene, employer was not prejudiced by such failures; that no Fourth Amendment rights of the employer were violated by the inspection; that, where administrative law judge had found that Secretary had violated the Act and thus made no findings as to employer's violations, the Commission, upon determining that Secretary had not violated the Act, was empowered to make its own findings as to employer's violations; and that finding that there was a serious violation of which the employer knew or should have known was supported by the evidence.

Affirmed.

1. Labor Relations ⇐7

Violation of the Occupational Safety and Health Act is deemed serious if there is a substantial probability of death or serious injury resulting from it. Occupational Safety and Health Act of 1970, § 1 et seq., 29 U.S.C.A. § 651 et seq.

2. Labor Relations ⇐7

Employer is excused from violation of the Occupational Safety and Health Act only if he did not and could not with the exercise of reasonable diligence know of the violation. Occupational Safety and Health Act of 1970, § 17(j), 29 U.S.C.A. § 666(j).

3. Labor Relations ⇐27

Administrative law judge is to make a report of his determinations with respect to alleged violation of Occupational Safety and Health Act and that report, which constitutes his final disposition of the proceedings, becomes the final order of the Occupational Safety and Health Review Commission unless any Commission member directs review by the Commission within 30 days. Occupational Safety and Health Act of 1970, § 12(j), 29 U.S.C.A. § 661(i).

4. Labor Relations ⇐27

Where there was no showing that, had employer and employee representatives accompanied OSHA inspector, any further material or mitigating facts might have emerged from investigation of construction accident, and where employer had opportunity before administrative law judge to present any such evidence and failed to do so, no harm resulted to the employer from Secretary of Labor's alleged violation of the Occu-

pational Safety and Health Act by virtue of compliance officer's failure to identify himself immediately upon arriving at the scene of the accident and failure to extend walk-around privileges to employer and employee representatives. Occupational Safety and Health Act of 1970, § 8(a, e), 29 U.S.C.A. § 657(a, e).

5. Labor Relations ⇐27

Evidence obtained illegally in violation of the Occupational Safety and Health Act is not subject to an automatic exclusionary rule precluding its consideration by hearing examiner or Occupational Safety and Health Review Commission without respect to how minor or technical the violation and without respect to how egregious or harmful the safety violation. Occupational Safety and Health Act of 1970, § 1 et seq., 29 U.S.C.A. § 651 et seq.

6. Labor Relations ⇐7

Manifest purpose of the Occupational Safety and Health Act is to assure safe and healthful working conditions. Occupational Safety and Health Act of 1970, § 1 et seq., 29 U.S.C.A. § 651 et seq.

7. Searches and Seizures ⇐7(1)

Where job site at which construction accident occurred was on a public street and where there was no evidence that OSHA inspector looked where he had no right to look, or that he filched information to which he was not entitled, fact that inspector did not show his credentials immediately upon arriving at scene of accident and waited approximately an hour before orally identifying himself to the superintendent did not violate employer's Fourth Amendment rights. Occupational Safety and Health Act of 1970, §§ 1 et seq., 8(a), 29 U.S.C.A. §§ 651 et seq., 657(a); U.S.C.A.Const. Amend. 4.

8. Labor Relations ⇐27

OSHA statutory scheme contemplates that the Occupational Safety and Health Review Commission is the fact finder and that the administrative law judge is an arm of the Commission for that purpose. Occupational Safety and Health Act of 1970, § 12(e), 29 U.S.C.A. § 661(d).

9. Labor Relations ⇐27

Upon issuance of decision by administrative law judge with respect to alleged OSHA violation, jurisdiction rests solely in the Occupational Safety and Health Review Commission and, although either party may petition for discretionary review by the Commission, neither party has a right to review by the Commission nor the right to present additional material or oral argument on any matter. Occupational Safety and Health Act of 1970, § 1 et seq., 29 U.S.C.A. § 651 et seq.

10. Labor Relations ⇐27

Court of Appeals reviews only the final order of the Occupational Safety and Health Review Commission and the Commission's findings of facts are conclusive if supported by substantial evidence. Occupational Safety and Health Act of 1970, § 11(a), 29 U.S.C.A. § 660(a).

11. Labor Relations ⇐27

Administrative law judge's decision with respect to alleged OSHA violation is merely a report and not final until the Occupational Safety and Health Review Commission allows it to become so by inaction; once the Commission decides to review, it may review the entire record, including transcripts, briefs, proposed

findings, motions and the like. Occupational Safety and Health Act of 1970, § 12(j), 29 U.S.C.A. § 661(i).

12. Labor Relations ⇐27

Fact that Occupational Safety and Health Review Commission invited submissions on only two questions could not be construed as a limitation on its review power. Occupational Safety and Health Act of 1970, § 12(j), 29 U.S.C.A. § 661(i).

13. Labor Relations ⇐27

Occupational Safety and Health Review Commission, upon ordering review of decision of administrative law judge who made no conclusions as to employer's safety violations because he determined that Secretary of Labor had violated the Occupational Safety and Health Act, and having determined that Secretary's violations if any, did not preclude imposition of penalties, was authorized to assess the fine itself and was not required to remand the matter to the administrative law judge. Occupational Safety and Health Act of 1970, § 12(j), 29 U.S.C.A. § 661(i).

14. Labor Relations ⇐27

If there is substantial evidence in the record to support the finding of a serious violation of the Occupational Safety and Health Act, order of the Occupational Safety and Health Review Commission must be affirmed. Occupational Safety and Health Act of 1970, §§ 11(a), 17(j), 29 U.S.C.A. §§ 660(a), 666(j).

15. Labor Relations ⇐10

Evidence that walls of trench in which workmen were digging consisted of crumbly sand with little cohesion and low shear strength at 12 to 19 feet, that nearby backfilled gas line weakened the vertical plane, that the soil was unstable and trench shield alone afforded inadequate protection, and that the shield was ten feet too short to protect against the entire trench wall sustained finding that there was a violation of the Occupational Safety and Health Act and attendant regulations and that the violation was a serious one, i. e., one involving a substantial probability of death or serious injury. Occupational Safety and Health Act of 1970, §§ 11(a), 17(j), 29 U.S.C.A. §§ 660(a), 666(j).

16. Labor Relations ⇐10

Testimony by employer's expert that one could see that sand in trench, the wall of which gave way, was friable merely by inserting a small shovel into the trench wall, and evidence that employer knew that backfilled gas line was nearby and could cause serious problems, and that the protective shield was ten feet too short to reach the bottom of the wall sustained finding that employer knew or should have known of existence of a serious violation of the Occupational Safety and Health Act. Occupational Safety and Health Act of 1970, §§ 11(a), 17(j), 29 U.S.C.A. §§ 660(a), 666(j).

17. Labor Relations ⇐10

Once it is determined that a shield or some other protective measure is required, it must meet the standard requirements of OSHA regulations. Occupational Safety and Health Act of 1970, § 1 et seq., 29 U.S.C.A. § 651 et seq.

Petition for Review of an Order of the Occupational Safety and Health Review Commission (Texas Case).

Before GEWIN, DYER and ADAMS,* Circuit Judges.

* Of the Third Circuit, sitting by designation.

DYER, Circuit Judge:

Accu-Namics, Inc., seeks review of a final order of the Occupational Safety and Health Review Commission finding petitioner, Accu-Namics, guilty of a "serious violation" of the Occupational Safety and Health Act (OSHA). 29 U.S.C.A. § 651 et seq.

Accu-Namics contracted in 1971 with the city of Lubbock, Texas, to lay a sewer line, which involved digging a deep, narrow trench and laying the pipe. The men working in the trench were protected by a portable shield designed to prevent cave-ins. Nevertheless, while the work was in progress the trench did cave in, and four employees were killed.

An OSHA compliance officer was working nearby and arrived on the scene about an hour after the accident while rescue operations were still in progress. He did not identify himself immediately but testified that "it might have been an hour or so" before he informed Conklin, the superintendent, who he was. He returned with the area director to complete his investigation on the following day, but found no one on the job site.

[1, 2] The compliance officer, acting as the representative of the Secretary of Labor, issued a citation for a serious violation. A violation is deemded "serious" under the Act if there is a substantial probability of death or serious injury resulting from it. The employer is excused only if he did not and could not with the exercise of reasonable diligence know of the violation. 29 U.S.C.A. § 666(j).

The violation for which Accu-Namics was cited was that the workers in the trench were inadequately protected from cave-in. The bottom 21 feet of the trench wall was of soft material, and was not adequately shored or supported so as to protect employees in the trench bottom as required by 29 C.F.R. § 1926.652(b).[1] Further, the regulations provide that where slides or cave-ins might occur as a result of adjacent backfilled excavation, "additional precautions" to shore or brace must be taken. 29 C.F.R. § 1926.652(e).[2] The citation recites that no such precautions were taken, although a backfilled excavation of a 5-foot deep gas line existed 5.5 feet from the center line of the trench.

The trench at the cave-in site was 24 feet deep. The portable shield used to protect the workers extended 14.25 feet from the ground level down into the trench. The shield, according to the citation, was inadequate under 29 C.F.R. § 1926.653(p)[3] because it did not support the trench walls all the way to the bottom. Ten feet of trench wall where the men were working was not shielded, nor was it braced in any other manner. This was the substance of the violation.

1. 29 C.F.R. § 1926.652(b) reads in pertinent part:

(b) Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them.

2. 29 C.F.R. § 1926.652(e) reads:

(e) Additional precautions by way of shoring and bracing shall be taken to prevent slides or cave-ins when excavations or trenches are made in locations adjacent to backfilled excavations, or where excavations are subjected to vibrations from railroad or highway traffic, the operation of machinery, or any other source.

3. 29 C.F.R. § 1926.653(p) reads:

(p) "Trench shield"—A shoring system composed of steel plates and bracing, welded or bolted together, which support the walls of a trench from the ground level to the trench bottom and which can be moved along as work progresses.

Accu-Namics contested the citation and was given an adversary hearing before an administrative law judge (hearing examiner). The judge entered extensive findings of fact which included the finding that the cave-in was caused by the simultaneous occurrences of the following conditions:

1. The soil between 12 and 19 feet was a slightly reddish fine silty sand which had very little cohesion. Soil was friable even under finger tips.

2. The moisture content of the fine sand between 12 and 19 feet was particularly high and resulted in low shear strength.

3. The construction of the trench for the existing gas line at 4 feet away created a weak vertical plane. The bond between the filled-in soil in the trench and the original undisturbed soil was so small as to cause a top tensile zone in soil, as the sewer trench was cut.

4. The wheel carrying the weight of the shield and gravel hopper acted as a concentrated load at the above vertical plane.

The judge, however, made no finding as to the employer's culpability under the Act. He held instead that the Secretary had violated both the Act and his own regulations by failing to advise Accu-Namics of the inspection "until it was completed,"[4] and by failing to accord the employer "walkaround" rights.[5] The judge further held that these omissions by the Secretary violated "basic fairness and procedural due process inherent in the Act." He concluded that

4. Section 8(a) of the Act, 29 U.S.C.A. § 657(a), provides:

> (a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

The supplementing regulation, 29 C.F.R. § 1903.7(a), provides in pertinent part:

> (a) . . . At the beginning of an inspection, Compliance Safety and Health Officers shall present their credentials to the owner, operator, or agent in charge at the establishment; explain the nature and purpose of the inspection; and indicate generally the scope of the inspection and the records specified in § 1903.3 which they wish to review.

5. Section 8(e) of the Act, 29 U.S.C.A. § 657(e), provides:

> (e) Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) of this section for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

The supplementing regulation, 29 C.F.R. § 1903.8(a), provides in pertinent part:

> (a) Compliance Safety and Health Officers shall be in charge of inspections and questioning of persons. A representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace for the purpose of aiding such inspection.

this violation required that the citation and proposed penalty be vacated.

[3] The Act provides that the hearing examiner is to make a "report" of his determinations "which constitutes his final disposition of the proceedings." This report becomes the final order of the Commission in 30 days, unless within that period any Commission member directs review by the Commission. 29 U.S.C.A. § 661(i). In this case, a Commission member did direct such a review and the parties were notified as follows:

> The undersigned hereby directs review of the recommended decision and orders in the captioned case pursuant to section 12(j) of the Occupational Safety and Health Act of 1970 (29 U.S.C.A. § 661(i)).
>
> Submissions are invited on the following issue:
>
> Whether the Judge properly interpreted and applied sections 8(a) and 8(e) of the Act in this case.

Upon the consideration of the case, the Commission reversed the administrative law judge on the procedural questions of credentials (section 8(a)) and walkaround rights (section 8(e)). It then moved to the merits, specifically adopted the judge's findings of fact, and held that Accu-Namics was guilty of a serious violation, reinstating the original citation and $500 penalty. Accu-Namics appeals this final order under Section 11(a) of the Act. 29 U.S.C.A. § 660(a).

Our analysis begins with the question whether the Commission properly interpreted and applied Section 8(a) and 8(e) of the Act. If it was correct, then we must decide whether it was proper for the Commission, at least in this case, to reach the merits rather than remand. If it was proper, then the final question is the usual one for our review of the merits: whether the decision of the agency is supported by substantial evidence on the record considered as a whole. 29 U.S.C.A. § 660(a); Ryder Truck Lines, Inc. v. Brennan, 5 Cir. 1974, 497 F.2d 230, 232. We answer all these questions in the affirmative.

First, we turn to the interpretation and application of Sections 8(a) and 8(e). As to Section 8(a), credentials, the Commission held that there is no mandatory requirement for an inspector to present credentials when, as here, the work place is open to the public. Further, the Commission held that even if the requirement is mandatory, it was substantially complied with when the inspector verbally identified himself to the superintendent at the site. Finally, even if there was a technical failure to comply with the statute, it was harmless error to hear the evidence obtained by the investigation because there was preponderant evidence *aliunde* to support the violation.

As to Section 8(e), the Commission recited in its opinion that it has held the "walkaround" requirement to be directory rather than mandatory.[6] The Commission said that, for the employer and employee representatives to have accompanied the inspector would probably have been helpful, but under the circumstances it was highly impractical. Further, said the Commission, it will not "invoke the extreme sanction of vacating a citation for failure to comply with section 8(e)" unless there is a showing of prejudice. Here there was not even an

6. The cases to which the Commission refers are Chicago Bridge and Iron Co., Jan. 19, 1973, No. 224, and Wright-Schuchart Harbor Contractors, Feb. 15, 1973, No. 559.

allegation of prejudice on the part of the employer.

[4–7] With regard to these two provisions, then, the Commission has covered all its legal bases, defending under all theories its view that any violation the Secretary may have committed does not negate the employer's violation. We need not go so far. We need not decide whether the inspector violated Section 8(a), nor whether if he did it was harmless error, nor whether Section 8(e) is directory or mandatory. We await the proper case for decision of these questions. We merely hold that even if the Secretary conducted an illegal inspection (which we assume only for argument's sake), under the circumstances here these violations cannot operate to exclude evidence obtained in that inspection when there is no showing that the employer was prejudiced in any way.[7] Here, Accu-Namics contends that its constitutional right to procedural due process has been infringed. But it would have us adopt an exclusionary rule which would exclude all evidence obtained illegally, no matter how minor or technical the governmental violation, and no matter how egregious or harmful the employer's safety violation. This we refuse to do. The manifest purpose of the Act, to assure safe and healthful working conditions, militates against such a result. 29 U.S.C.A. § 651; Brennan v. OSHRC (J. W. Bounds), 5 Cir. 1973, 488 F.2d 337, 338. There has been no violation of the employer's fourth amendment right here; the jobsite was on a public street. There is no showing that the inspector looked where he had no right to look, nor that he filched information to which he was not entitled, had he shown his credentials. There is no showing that, had employer and employee representatives accompanied him, any further material or mitigating facts might have emerged. Accu-Namics had the opportunity before the hearing examiner to present any such evidence and to cross-examine the inspector. At oral argument, counsel failed to indicate any specific way in which Accu-Namics was prejudiced. Therefore, because Accu-Namics has shown no harm resulting from the Secretary's alleged violations of the Act, we decline to adopt any sweeping exclusionary rule that would exclude the facts regarding the violation. We affirm the Commission's holding that if the Secretary violated the Act in the manner alleged, it did not justify vacating the citation.

The next question, somewhat novel, is a procedural one. Accu-Namics urges that the Commission had no right, having ordered a review and invited submissions on the 8(a) and 8(e) question, to proceed to a decision on the merits when the administrative law judge had made no conclusions as to the safety violation. The Commission should have remanded, urges Accu-Namics. Normally, were this a trial judge and an appellate court, that procedure would be followed. Presumably, that would be the normal situation at the Commission as well if additional evidence were needed. However, there are several reasons for viewing this situation differently.

7. *See* Brennan v. OSHRC (Bill Echols Trucking Co.), 5 Cir. 1973, 487 F.2d 230, 236, in which this Court said:

> Commission decisions . . . apparently have recognized that at least a finding of prejudice to the employer must precede dismissal of a proposed penalty for violation of a procedural rule.

[8–10] First, the statutory scheme contemplates that the *Commission* is the fact-finder, and the judge is an arm of the Commission for that purpose. The statute provides that the Commission chairman is to appoint such hearing examiners as he deems necessary to assist in the work of the Commission. 29 U.S.C.A. § 661(d). The hearing examiner (also called "judge," 29 C.F.R. § 2200.-1(f)) is to hear and "make a determination upon" the proceedings and

> shall make a report of any such determination which constitutes his final disposition of the proceedings.

29 U.S.C.A. § 661(i). This "report" becomes the final order of the Commission within thirty days unless a Commission member directs review within that time. *Id.* When it notified the parties in this case that the decision would be reviewed, the Commission referred to the judge's report as a "recommended decision." The regulations provide that the decision of the judge is to include findings of fact, conclusions of law, and an order. 29 C.F.R. § 2200.90(a). Upon issuance of the decision, jurisdiction rests solely in the Commission. 29 C.F.R. § 2200.90(b). The regulations provide that a party aggrieved by the judge's decision may petition for discretionary review by the Commission, 29 C.F.R. § 2200.91, but a party has neither the right to review by the Commission, nor the right to present additional material or oral argument on any matter. 29 C.F.R. § 2200.93. The Court of Appeals reviews only the final order of the Commission, and the Commission's findings of fact are conclusive if supported by substantial evidence. 29 U.S.C.A. § 660(a).

[11–13] This overview of the statute and regulations demonstrates that the Commission itself is charged with findings of fact. The judge's "decision" is merely a report, weighty of course, but not final until the Commission allows it to become so by inaction. Once the Commission decides to review, it may review the entire record, including transcript, briefs, proposed findings, motions, and the like. Here, although the Commission invited submission on two questions, this cannot be construed as a limitation on its review power. The parties had an opportunity to be fully heard at the hearing before the administrative law judge; their opportunity for full review is before this Court.

It should be noted that we are not confronted here with the common problem of an agency which disagrees on the facts with its own hearing examiner. *See* Universal Camera Corp. v. NLRB, 1951, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456. Here the Commission *adopted* the judge's findings of fact. This brings us to the final question, whether these findings are supported by the record.

[14] Reviewing courts are bound to apply the substantial evidence test to the Commission's findings of fact. 29 U.S.C.A. § 660(a); Ryder Truck Lines, Inc. v. Brennan, *supra*; Beall Construction Co. v. OSHRC, 8 Cir. 1974, 507 F.2d 1041, 1046; Brennan v. OSHRC (Hanovia Lamp Division), 3 Cir. 1974, 502 F.2d 946, 950–51. If there is substantial evidence in the record to support the finding of a serious violation, the order must be affirmed. Ryder Truck Lines, Inc. v. Brennan, *supra*; American Smelting & Refining Co. v. OSHRC, 8 Cir. 1974, 501 F.2d 504; REA Express, Inc. v. Brennan, 2 Cir. 1974, 495 F.2d 822, 825; National Realty & Construction Co., Inc. v. OSHRC, 1973, 160 U.S.App.D.C. 133, 489 F.2d 1257, 1260.

[15] The causes of the cave-in were listed above. Based on the judge's findings that the walls of the trench at 12 to 19 feet were crumbly sand with little cohesion and low shear strength, and that the nearby backfilled gas line weakened the vertical plane, the Commission concluded that the soil was unstable and that the trench shield alone afforded inadequate protection. There is substantial evidence in the record to support all of these findings. The judge's findings as to the causes of the cave-in were taken almost verbatim from the testimony of Accu-Namics' own expert. The shield was indisputably too short to protect against the entire trench wall. There is no question that there is a substantial probability of death or serious injury resulting from a cave-in of this sort. Therefore, the only real dispute is whether the employer should be excused from the serious violation, that is, whether he knew or should have known it existed.

[16, 17] Although the evidence is contradictory on this question, there is substantial evidence to support the Commission. Accu-Namics' expert testified that one could see that the sand was friable (crumbly) merely by inserting a small shovel into the trench wall. Further, although there was some confusion that precisely how far away it was, there is no question that the employer knew that the backfilled gas line was nearby and could cause serious problems. Once it is determined that a shield (or some other protective measure) is required, then it must meet the standard requirements of 29 C.F.R. § 1926.653(p),[8] which this one clearly failed to do.

Thus, we find substantial evidence to support the Commission's finding of a serious violation.

Affirmed.

8. *Supra*, n. 3.

EXHIBIT D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1974

No. 74-2979
OSHRC Docket No. 477

ACCU-NAMICS, INC., Petitioner,
v.
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, JOHN T. DUNLOP, Secretary of Labor, Respondent.

Petition for Review of an Order of the Occupational Safety and Health Review Commission (Texas Case)

Before GEWIN, DYER and ADAMS,* Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Accu-Namics, Inc. for review of an order of the Occupational Safety and Health Review Commission of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Occupational Safety and Health Review Commission in this cause be, and the same is hereby affirmed;

It is further ordered that petitioner pay to respondent the costs on appeal to be taxed by the Clerk of this Court.

July 11, 1975

Issued as Mandate:

*Of the Third Circuit, sitting by designation.

EXHIBIT E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
September 26, 1975

TO ALL COUNSEL OF RECORD

No. 74-2979—Accu-Namics, Inc. vs. Occupational Safety & Health Review Commision, John T. Dunlop, Secretary of Labor

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
by CLARE F. SACKS
Deputy Clerk

cc: Mr. David Ford Hunt
Mr. Stephen F. Eilperin
Ms Judith S. Feigin